No. 88-1993

In The

Supreme Court of the United States

October Term, 1989

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida, and
T. EDWARD AUSTIN, JR.,
as State Attorney assigned to the
Charlotte County, Florida, Special Grand Jury,

Petitioners,

v.

MICHAEL SMITH,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE THE FLORIDA PRESS ASSOCIATION, THE FLORIDA SOCIETY OF NEWSPAPER EDITORS, THE FLORIDA FIRST AMENDMENT FOUNDATION, THE MIAMI HERALD PUBLISHING COMPANY, THE TRIBUNE COMPANY, and McCLATCHY NEWSPAPERS, INC.

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QUESTION PRESENTED

WHETHER SECTION 905.27 OF THE FLORIDA STATUTES VIOLATES THE FIRST AMENDMENT BECAUSE IT PUNISHES THE PUBLICATION OF TRUTHFUL INFORMATION CONCERNING STATE GRAND JURY PROCEEDINGS WITHOUT BEING NARROWLY TAILORED TO SERVE A STATE INTEREST OF THE HIGHEST ORDER.

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INTEREST OF AMICI CURIAE

Amici Curiae The Florida Press Association, The Florida Society of Newspaper Editors, The Florida First Amendment Foundation, The Miami Herald Publishing Company, the Tribune Company, and McClatchy Newspapers, Inc. (the "Amici") file this brief in support of Respondent Michael Smith. Petitioners and Respondent have consented to the filing of the brief. Their written consents are on file with the Clerk of the Court.

The Amici are, or represent, newsreporters, editors, publishers, and broadcasters.[1] The Amici have a direct interest in the outcome of this case because they routinely report on the activities of grand juries. This reporting

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[1] The Florida Press Association is an association of 55 daily and 160 weekly newspapers published in Florida.

The Florida Society of Newspaper Editors is a professional association of Florida journalists who exercise editorial control or editorial functions at Florida daily newspapers.

The Florida First Amendment Foundation is a not-for-profit organization of Florida publishers and broadcasters supporting the principles embodied in the First Amendment.

The Miami Herald Publishing Company is a division of Knight-Ridder, Inc., a Florida corporation, and publishes *The Miami Herald*, a daily newspaper in Miami, Florida, which is distributed throughout the State of Florida.

The Tribune Company publishes *The Tampa Tribune*, a daily newspaper of general circulation in the Tampa Bay area.

McClatchy Newspapers, Inc. owns and operates twelve newspapers in California, Washington, and Alaska with an aggregate circulation of approximately 700,000.

often involves the interview of grand jury witnesses, particularly following either an indictment or presentment, or the decision of a grand jury not to indict.

This case is particularly threatening to the press in Florida because the law the State seeks to uphold would punish a journalist for reporting about a special grand jury investigation of alleged corruption in both the state attorney's office and the sheriff's department in Charlotte County, Florida. The law would "permanently and absolutely" silence expression that "lies near the core" of the First Amendment, and it would thwart the constitutional role of the press as a "watchdog" on government. This Florida statute illustrates precisely the danger of broad and vaguely worded criminal laws that punish the publication of truthful speech addressing matters of great public concern. Its "chilling effect" is obvious.

The Amici join with Respondent Michael Smith in asking this Court to affirm the unanimous decision of the United States Court of Appeals for the Eleventh Circuit invalidating section 905.27 of the Florida Statutes.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case filed by Respondent Michael Smith, but would emphasize the following points:

Through his prior and independent reportorial activity, which included the publication of newspaper articles,

Smith, a journalist with the *Charlotte Herald-News*, developed information that ultimately led to his being subpoenaed to testify before the special grand jury investigating alleged corruption in the Charlotte County state attorney's office and sheriff's department. The special grand jury ended its activity in April 1986.

Smith would now publish a news story, and perhaps a book, about this investigation into official corruption. He is deterred from publishing the facts concerning the investigation because he has been threatened with criminal prosecution by the legal staff of the Special Prosecutor. He was admonished that *any* disclosure of his grand jury testimony, evidence taken, or proceedings of the special grand jury would be a criminal violation of section 905.27 of the Florida Statutes.

Florida Statutes § 905.27 provides, in pertinent part, as follows:

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, *or any other person* appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:
>
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;
>
> (b) Determining whether the witness is guilty of perjury; or
>
> (c) Furthering justice.
>
> (2) It is unlawful for *any person* knowingly to publish, broadcast, disclose, divulge, or

> communicate to any other person, . . . in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. . . .

(Emphasis added). Thus, except for three narrowly defined exceptions, § 905.27 imposes a "permanent and absolute" ban on the publication of truthful information about grand jury proceedings.

No testimony or other evidence was presented in the trial court of any specific instance in which a grand jury investigation, either state or federal, was materially obstructed because of witness disclosures.[2]

SUMMARY OF ARGUMENT

Section 905.27 of the Florida Statutes imposes criminal punishment for the publication of truthful information concerning grand jury investigations. This Court has circumscribed the power of the States to impose criminal liability for the publication of truthful information that "lies near the core" of the First Amendment, even where

[2] The evidence in the record comports with the 1980 Comptroller General's report to Congress on the operations of the federal grand jury system, which allows witness disclosures. The report found no instances of harmful disclosure by grand jury witnesses. General Accounting Office, *Comptroller General's Report to the Congress: More Guidance and Supervision Needed Over Federal Grand Jury Proceedings* 45, Doc. No. GGD-81-18 (1980).

that information is confidential by statutory law. *The Florida Star v. B.J.F.*, 491 U.S. ___, 105 L. Ed. 2d 443 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Truthful publications, even of confidential information, may be the target of state criminal laws, if at all, only where a state interest "of the highest order" is implicated, and the statute is "narrowly tailored" to serve that interest. *Florida Star*, 105 L. Ed. 2d at 455-58. Section 905.27 fails both requirements.

First, the State essentially concedes that § 905.27 does not serve a governmental interest of the "highest order," and makes no serious attempt to meet the test, arguing instead that the statute is constitutional because it advances a "substantial interest." (Pet. Br. 17-22). Petitioners' reluctance to accept the more stringent test is scarcely surprising since § 905.27 cannot meet it. Both state and federal law enforcement experience demonstrates grand jury witness "gag" rules are not needed to preserve important government interests. Rule 6(e) of the Federal Rules of Criminal Procedure, which governs the federal grand jury system, does not "gag" grand jury witnesses, and neither do the laws of three-fourths of the 50 states. Florida itself prosecutes only a very small percentage of crimes through the use of "secret" grand jury proceedings (Pet. Br. 5), relying primarily on prosecutor informations which are public records upon filing. Moreover, the decisions of this Court construing the standard, and the evidence presented in the trial court, demonstrate that the interests served by § 905.27 are not concerns of the "highest order." Far from serving a governmental interest of the "highest order," the impermissible purpose

of § 905.27 is to insulate the Florida grand jury system from public scrutiny and meaningful public discussion.

Second, even were there a state interest of the "highest order" lurking behind § 905.27, the law simply is not "narrowly tailored" to serve that interest. The criminal prohibition is, as the unanimous Eleventh Circuit panel noted, "permanent and absolute," not narrowly tailored. *Smith v. Butterworth*, 866 F.2d 1318, 1319 (11th Cir. 1989). It is not limited in application to witnesses or even participants in the grand jury process; it is not limited to the disclosure of illegally obtained information; it is not limited to disclosures made before the grand jury has concluded its work, issued indictments, or its targets have been apprehended; it is not limited to disclosures which would compromise existing investigations, interfere with future presentments or indictments, prejudice defendants' rights, or even damage reputation. The statute contains no provisions for disclosures which would be in the public interest. In fact, § 905.27 employs terms such as "gist" and "import" which themselves are so amorphous that they render the law unconstitutionally vague.

Petitioners claim § 905.27 need only meet the more relaxed "incidental restriction" test applied by this Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The State contends the "incidental restriction" test is applicable because § 905.27 involves information that is obtainable only from the grand jury process, just as *Seattle Times* involved information to which litigants enjoyed access only through participating in the court ordered civil discovery process. The State's analogy misunderstands *Seattle Times* in several important respects.

First, *Seattle Times* did not address, much less condone, the punishment of truthful speech, nor did it purport to establish a lesser constitutional test for such punishment. Second, in *Seattle Times* this Court affirmed the facial validity of the Washington equivalent of Rule 26(c) of the Federal Rules of Civil Procedure, which provides that materials obtained through discovery are presumptively open to public disclosure, but litigants may be restricted in their right to disclose the information gained through the discovery process where "good cause" is shown. Rather than the "permanent and absolute" ban on disclosure that § 905.27 would impose, Rule 26(c) provides for a case-by-case adjudication, requiring the showing of a particularized need to restrict dissemination of information the public ordinarily has the right to receive. Third, unlike § 905.27, *Seattle Times* restricted public disclosure of information only insofar as it was obtained solely by "legislative grace" through the discovery process, and then only insofar as dissemination was not necessary for court filings or proceedings during litigation of the case.

Finally, this Court in *Seattle Times* applied the "incidental restriction" test because the Rule 26(c) protective order process was enacted to facilitate the efficient litigation of cases, not to suppress or punish truthful speech. Rule 26(c) orders only rarely and incidentally reduce the stock of information available to the public. Section 905.27, in contrast, is a direct criminal sanction and prohibition on speech based solely upon its content. The "incidental restriction" test does not apply here because the restraint on expression is direct and the benefit, if any, to Florida's grand jury system is incidental and remote. The

State has it exactly backwards. As such, the rule of *Seattle Times* does not apply to § 905.27.

The unanimous decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

ARGUMENT

I. SECTION 905.27 OF THE FLORIDA STATUTES VIOLATES THE FIRST AMENDMENT BECAUSE IT PUNISHES THE PUBLICATION OF TRUTHFUL INFORMATION CONCERNING STATE GRAND JURY PROCEEDINGS WITHOUT BEING "NARROWLY TAILORED TO SERVE A STATE INTEREST OF THE HIGHEST ORDER"

Recent decisions of this Court "demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979); *The Florida Star v. B.J.F.*, 491 U.S. ___, 105 L. Ed. 2d 443 (1989). This holds true even when the state has determined the published information should be confidential. *Daily Mail*, 443 U.S. at 104; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

Section 905.27 indulges in the dubious pursuit of punishing the publication of truthful information and speech relating to grand jury proceedings. Such statutes require "the highest form of state interest to sustain [their] validity." *Daily Mail*, 443 U.S. at 102. All of this Court's recent decisions involving similar restraints hold

"that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103, *quoted in Florida Star*, 105 L. Ed. 2d at 455. Section 905.27 is unconstitutional because, as the State essentially acknowledges, it fails to serve a state interest of the "highest order." In addition, even were any interest it served deemed to be of the "highest order," the statute is not narrowly tailored to serve such an interest.

A. Section 905.27 Does Not "Serve a State Interest of the Highest Order"

There is really little question as to whether § 905.27 serves any state interest of the "highest order" because the State virtually concedes it does not. Instead, Florida argues only that grand jury secrecy has been traditional[3] and serves "substantial" governmental interests. This is fatal to its position.

The State incorrectly asserts that it need not meet the "highest order" standard because "respondent Smith

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[3] The State is misleading in its reference to a tradition of grand jury secrecy. That tradition has not encompassed gag orders on witnesses:

> Most jurisdictions, however, do not include the witness in the list of persons sworn to secrecy; they leave the witness free to disclose either publicly or privately both his own testimony and whatever information was revealed to him by the grand jurors or prosecutor in the process of examination.

LaFave, 1 *Criminal Procedure* § 8.5(c) at 631 (1984).

does not seek to publish information that has been 'lawfully obtained.' " (Pet. Br. 18). The State's sole basis for this claim is that the "events transpiring in the grand jury room and the testimony given therein are not information that is available to the public or that has been lawfully acquired." (Pet. Br. 18). But the record is clear that Smith would be punished for disclosing his own testimony, which information he certainly acquired lawfully. There is nothing in the record to support the proposition that any other information he may have was not acquired lawfully. The statute makes neither the *receipt* of information relating to the grand jury unlawful, nor is its scope limited to the disclosure of illegally obtained information. The State has failed to distinguish *Daily Mail, Florida Star,* and *Landmark.*

The State's only attempt to argue that § 905.27 serves a governmental interest of the "highest order" is its footnote assertion that "protection of a grand jury's secrecy would surely qualify as the 'highest form of state interest.' " (Pet. Br. 18 n.7). The State asserts that Smith "has only argued that because the federal government makes do with a lesser degree of secrecy, the states should too." (*Id.*). But what Smith actually has shown is that neither the federal grand jury rules, which are used to return more than 38,000 indictments each year,[4] nor the grand

[4] Administrative Office of the U.S. Courts, *Grand Juror Service: Annual Report of the Director of the Administrative Office of the U.S. Courts for the Twelve Month Period Ended June 30, 1989* app. D-2 at 60 (1989)

jury statutes and rules in 38 of the 50 states,[5] require a permanent and absolute gag on grand jury witnesses. Indeed, W. Christian Hoyer, a chief assistant state attorney, testified that of the 15,000 felonies his office handled

[5] The following state statutes and/or rules do not prohibit a witness from disclosing his own state grand jury testimony: Alaska R. Crim. P. 6(l) (1989); Ariz. Rev. Stat. Ann. § 13-2812 (1987); Ark. Stat. Ann. § 16-85-514 (1987); Cal. Penal Code § 924.2 (West 1985); Conn. Gen. Stat. Ann. § 54-45a (West 1985); Del. Code Ann. tit. 11, § 1273 (1987); Del. R. Crim. P. 6(e) (1974); D.C. R. Crim. P. 6(e) (1989); Ga. Code Ann. § 15-12-68 (1985); Haw. R. Penal P. 6(e) (1988); Idaho Crim. R. 6(e) (1987); Idaho Code § 19-1112 (1988); Ill. Rev. Stat. ch. 38, para. 112-6 (Smith-Hurd Supp. 1989); Iowa R. Crim. P. 3(4)(d) (1985 & Supp. 1989); Kan. Stat. Ann. § 22-3012 (1988); Me. R. Crim. P. 6(e) (1988); Md. Cts. & Jud. Proc. Code Ann. § 8-213 (1984); Mass. R. Crim. P. 5(d) (1979 & Supp. 1989); Minn. R. Crim. P. 18.08 (1979 & Supp. 1989); Miss. Unif. Crim. R. 2.04 (1987); Mont. Code Ann. § 46-11-317 (1989); Neb. Rev. Stat. § 29-1414 (1985); Nev. Rev. Stat. § 172.245(2) (1985); N.H. Rev. Stat. Ann. § 600:4 (1986); N.J. Stat. Ann. § 2A:73B-3 (West Supp. 1989); N.M. Stat. Ann. § 31-6-6 (1984); N.Y. Penal Law § 215.70 (Consol. 1980); N.C. Gen. Stat. § 15A-623 (1988); Ohio R. Crim. P. 6(e) (1989); Okla. Stat. Ann. tit. 21, § 583 (1982); Ore. Rev. Stat. § 132.100 (1987); 42 Pa. Cons. Stat. Ann. § 4549d (1980 & Supp. 1989); P.R. Laws Ann. tit. 34, § 554 (1971); R.I. R. Crim. P. 6(e) (1989); South Carolina does not have a statute which governs grand jury secrecy; S.D. Codified Laws Ann. § 23A-5-116 (1988); Tenn. R. Crim. P. 6(k) (1988); Vt. R. Crim. P. 6(f) (1982 & Supp. 1989); V.I. Code Ann. tit. 5, § 3581 (Supp. 1989); Va. Code Ann. § 3A:5(b) (1989); W. Va. R. Crim. P. 6(e) (1989); Wis. Stat. Ann. § 756.21 (West 1981); Wyo. Stat. § 7-5-208 (1987). District of Columbia, Puerto Rico and the U.S. Virgin Islands statutes are cited but not included in the 38 states calculation.

each year, only 50 to 100 were grand jury indictments.[6] (Pet. Br. 5). The overwhelming empirical evidence is that such a ban is *not needed at all*.[7] The tradition of "grand

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[6] Hoyer also stated that the "lack of secrecy in the federal system had on occasion slowed an investigation, but not jeopardized it." (Pet. Br. 5). *See* General Accounting Office Report, *supra* note 2.

[7] Only 12 of the 50 states have enacted grand jury statutes which could be construed to impose a gag on a grand jury witness. Of these 12 statutes only 4 expressly impose an obligation of secrecy on a witness. *See* Ala. Code § 12-16-211 (1986) (This section, however, only prohibits the disclosure of "any of the facts to which [the witness] testified" before arrest, before bail or indictment. This section, therefore, only applies to premature disclosure because the "purpose of secrecy is largely accomplished after the indictment is found, the accused arrested and the grand jury finally discharged. . . ." *Ex parte Montgomery*, 12 So. 2d 314, 316 (Ala. 1943), *citing State ex rel. Brown v. Dewell*, 167 So. 687 (Fla. 1936)); Ala. Code § 12-16-216 (1986) (This section does not limit disclosure to before arrest, bail or indictment and therefore appears to be in direct conflict with § 12-16-211 and the Alabama Supreme Court's opinion construing that statute.); Colo. R. Crim. P. 6.2(a) (1980) (Rule 6.2(a) only gags a witness until "an indictment is made public . . . or until a grand jury report is issued dealing with the investigation."); N.D. Cent. Code § 29-10.1-30 (Supp. 1989) (This statute limits disclosure by a witness "until an indictment is filed and the accused is in custody."); Wash. Rev. Code Ann. § 10.27.090(e) (1980) (The statute creates a per se prohibition of any subsequent disclosure even if there is no indictment.).

The remaining 8 state statutes, including Florida Statutes § 905.27, prohibit a grand jury witness from disclosing his own testimony in vague and over inclusive language. *See* Ind. Code Ann. § 35-34-2-4(i) (West 1981) (The section states that "no person present during a grand jury proceeding may- . . . disclose . . . the nature or substance of any grand jury

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jury secrecy" simply does not extend to permanent gags on witnesses; the test of experience does not show these restraints serve any interest of the highest order.

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testimony." It is not clear whether this statutory language is intended to include witnesses. The final section of the statute reads "any court may require any person present during a proceeding to disclose the testimony of a witness as direct evidence in a prosecution for perjury." This implies that "any person present" does not include witnesses. Witnesses cannot testify to the testimony of other witnesses because they are not in attendance for testimony other than their own. One Indiana appellate court drew upon caselaw interpreting the federal rule to interpret this statute. *Pigman v. Evansville Press*, 537 N.E. 2d 547, 549 (Ind. Ct. App. 1989)); Ky. R. Crim. P. 5.24(1) (1983) (The rule states "all persons present during any part of the proceedings of a grand jury shall keep its proceedings and testimony given before it secret. . . ."); La. Code Crim. Proc. Ann. art. 434A (West Supp. 1989) (The statute states "all other persons present at a grand jury meeting . . . shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with a meeting of the grand jury." The comments specifically include witnesses within this shroud of secrecy.); Mich. Stat. Ann. § 28.959(6) (Callaghan 1985) (The statute states that "it is unlawful for any person to publish or make known to any other person any testimony or exhibits obtained . . . in connection with any grand jury inquiry."); Mo. R. Crim. P. 540.110 (1986) This rule imposes an oath of secrecy on all grand jury witnesses.); Tex. Code. Crim. Proc. art. 20.16 (Vernon 1977) (The statute requires witnesses to swear an oath of secrecy which prohibits the disclosure of "any matter."); Utah Code Ann. § 77-11-10 (1982) (The statute states that "No member of the grand jury or any person present at any session of the grand jury may disclose . . . what he or any grand juror or other person may have said except upon court order." This conflicts with § 77-10-8 which requires that grand jurors

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Neither does the evidence adduced in the trial court. Of the five witnesses who provided testimony regarding the operation of grand juries and the effect of the witness gag rule, none could identify a single instance in which witness disclosures in either the federal or state systems had compromised an investigation. The best evidence the State could muster was the conclusory affidavit of State Attorney D'Allessandro that "allowing witnesses to publicly disclose the nature and content of the testimony 'will be a hindrance to prosecution.'" (Pet. Br. 6). Two witnesses suggested that disclosure of witness testimony could damage reputations, and one witness feared witness disclosures might cause suspects to "flee from justice, destroy evidence, or engage in cover-up activities."[8] (Pet. Br. 7).

None of these interests rises to the level of a state interest of the highest order. In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the state's interest in protecting reputations and fostering rehabilitation of youthful offenders did not justify the punishment of

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or other court officials not disclose an indictment until the defendant is in custody, has given bail, or has been summoned. The Utah Supreme Court has stated that "after the indictment is returned and an accused arrested, the reasons for secrecy have largely been spent." *State v. Faux*, 345 P. 2d 186, 187 (Utah 1959).).

[8] These latter interests surely could not be present in this case which involves the publication of truthful information concerning a grand jury which concluded its investigation three years ago.

truthful speech regarding confidential juvenile proceedings. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the preservation of judges' reputations and of confidence in the judicial system did not justify punishment of truthful speech concerning confidential judicial disciplinary proceedings. In *The Florida Star v. B. J. F.*, 491 U.S. ___, 105 L. Ed. 2d 443 (1989), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the states' interest in protecting private reputations by maintaining the confidentiality of rape victims' identities was not deemed of the "highest order." In *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219 (7th Cir. 1984), *aff'd.*, 469 U.S. 1200 (1985), the interest in securing the apprehension of at-large criminal defendants was not a sufficiently compelling reason to punish the pre-arrest publication of the return of criminal informations that are confidential as a matter of law until the apprehension of the suspect. Thus, this Court has squarely rejected as not being of the "highest order" each and every interest even remotely suggested by this record.

B. Section 905.27 Is Not "Narrowly Tailored," But Vague and Overbroad

There can be no serious argument that § 905.27 is "narrowly tailored." As the court below noted, the statute imposes a "permanent and absolute ban on disclosure." 866 F.2d at 1320. Contrary to suggestions by the State, § 905.27 is not limited in scope to disclosures by participants, including witnesses, in the grand jury process; it applies to any disclosure by "any person." It is not limited to the disclosure of illegally obtained grand jury information; it is not limited by time frame to disclosures

made before the grand jury indicts, concludes its work, or the indicted suspects have been apprehended; it is not limited to disclosures which would compromise existing investigations or interfere with future investigations; it is not limited to disclosures which would prejudice defendants' rights or damage reputations; it contains no provisions allowing for publications in the public interest. The statute is broadly, not narrowly, drawn.

The failure of the statute to meet the "narrowly tailored" test can be easily seen by reference to the six "substantial purposes" the state asserts (Pet. Br. 12-13) are served by grand jury secrecy, relying upon *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979):

> 1. To prevent the escape of those whose indictment may be contemplated;
>
> 2. to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
>
> 3. to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it;
>
> 4. to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;
>
> 5. to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

While each of these interests may be legitimate, a permanent ban on witness disclosure applied three years after the grand jury has concluded its business is not narrowly tailored to "prevent the escape of those whose indictment may be contemplated," "prevent persons subject to indictment from importuning the grand jurors' or "prevent the subornation of perjury." These interests expired either before, or with, the conclusion of the grand jury, or they are irrelevant to Florida practice in which the identities of grand jurors are not secret.

Nor can it fairly be argued that the broad punishment of witness disclosures "encourages free and untrammeled disclosure by persons who have information with respect to the commission of crimes." If anything, the fear of inadvertently violating the vague contours of § 905.27 after giving testimony would deter witness disclosures to, and cooperation with, the grand jury. In fact, this is an important reason why the federal system has no prohibition on witness disclosures of grand jury testimony. *Smith v. Butterworth*, 866 F.2d 1318, 1320 (11th Cir. 1989) ("[t]he seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice. . . ." *quoting* Fed. R. Crim. P. 6(e) Committee Notes).

The asserted interest in protecting the reputation of wrongly accused persons who have been exonerated by a grand jury investigation is anomalous at best. If the accused has been exonerated, publication of that fact can hardly damage his reputation. The statute, in any event, is not limited to disclosures revealing an accused's name, nor should it be paternalistically presumed the public

cannot understand the difference between "being investigated" and "being guilty." *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

The State may be entitled to try to protect the confidentiality of grand jury *deliberations*, but § 905.27 is not narrowly tailored to such an end, that interest is not placed in jeopardy by Respondent, and that interest is not of the "highest order."

The statute here does not merely fail the "narrowly drawn" test. Its use of such broad and undefined terms as "gist" and "import" render it an unconstitutionally vague penal statute impinging on speech. *See, Kolender v. Lawson*, 461 U.S. 352, 358-59 n.7 (1983); *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness, permanency, and absoluteness of the statute, if taken seriously, would combine to make meaningful public discussion or scrutiny of the Florida grand jury system, or its operation in any particular case, impossible. Thus, the only purpose the statute truly serves is to insulate the grand jury from public criticism.

II. THE "INCIDENTAL RESTRICTION" TEST APPLIED IN *SEATTLE TIMES* IS IRRELEVANT TO SECTION 905.27 BECAUSE THE STATUTE IMPOSES A DIRECT PER SE CRIMINAL SANCTION UPON THE PUBLICATION OF TRUTHFUL INFORMATION IRRESPECTIVE OF ITS SOURCE

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), this Court affirmed the facial constitutionality of the Rule 26(c) protective order mechanism, holding that a court

may, upon a showing of "good cause," condition a litigant's recourse to court-ordered discovery upon his agreement not to gratuitously disseminate highly private information learned in that discovery.

In *Seattle Times*, the controversial religious organization Aquarian Foundation sued the newspaper for group libel. The paper propounded damages interrogatories seeking the membership and contributor lists of the Foundation, which sought a protective order. After the motion was initially denied, the Aquarians placed affidavits in the record detailing past retaliation against members of the sect known to the general public, and asserting their First Amendment right to engage in freedom of anonymous association. The trial court weighed this evidence and allowed the discovery, but conditioned it upon the restriction that it not be disseminated by the litigant newspaper except as necessary to the litigation of the case. This particularized evidentiary showing, which overcame in part the statutory presumption of open discovery, is constitutionally required of Rule 26(c) "good cause" protective orders. It is a process far removed from the "permanent and absolute" per se ban enacted by § 905.27. Although language in *Seattle Times* suggests much of what is wrong with § 905.27, the "incidental restriction" test it applied has nothing to do with this case.

First, and most obvious, in *Seattle Times* this Court did not have before it any issue regarding punishment for publishing truthful information. This Court did not determine, or even suggest, that punishment of truthful speech is subject to a lesser standard than the one articulated in *Daily Mail*. The question in *Seattle Times* was whether a

Rule 26(c) protective order restricting dissemination of materials obtained through discovery was valid, not whether criminal sanctions could be imposed if the protective order were violated and what test would have to be met in order to impose such a sanction. Because *Seattle Times* did not purport to address, let alone set, a standard for the criminal punishment of truthful speech, it does not support adoption of a lesser test here.

Second, *Seattle Times* did not affirm a "permanent and absolute" ban on disclosure; it validated a system of presumptive public disclosure of information obtained solely through discovery, which presumption could be overcome only where movants, on a case-by-case basis, make particularized showings of "good cause" for limiting dissemination. As the Court stated:

> We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

467 U.S. at 37 (footnote omitted).

Third, *Seattle Times* held that Rule 26(c) protective orders may be entered only with respect to information obtained through "legislative grace," that is, information obtained solely through the litigant's own exercise of the discovery privilege: "the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes." *Id.* at 34. Section 905.27 contains no such limitation. Irrespective of how Smith obtained his

information, the statute prohibits and punishes its disclosure.[9] The Florida statute ignores the very distinction upon which *Seattle Times* turns.

Finally, and perhaps most fundamental, the State seeks to apply the *Seattle Times* "incidental restriction" test to a statute that directly punishes truthful speech because of its content. The "incidental restriction" test applies only to state actions which do not directly and expressly restrict speech, but rather have only an indirect, unintended, or "incidental" impact on expression. The proposed application of the "incidental restriction" test to a direct restraint on speech is nothing short of Orwellian.

Seattle Times carefully justified the application of the less protective "incidental restriction" standard on the ground that "Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression." *Id.* The rules "enable parties to litigation to obtain information 'relevant to the subject matter involved' that they believe will be helpful in the preparation and trial of the case." *Id.* The very liberal discovery provided by the rule is "for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.

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[9] Much, if not all, of what Smith learned came without the use of any "legislative grace," but from his own prior investigation of alleged corruption in the Charlotte County law enforcement apparatus, and material gathered from other sources. Yet the statute would punish him for publishing this truthful information, and could pose extraordinary "tracing" problems if reporters were required to prove which information they learned from sources unrelated to the grand jury proceedings and participants. Such problems might prove insurmountable when confidential sources are involved.

Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have authority to issue protective orders conferred by Rule 26(c)." *Id.*

Rule 26(c) does not prohibit or punish truthful speech, either expressly or implicitly; it is not a content-based restriction on speech. It is a mechanism for efficiently litigating cases which may, on rare occasions and only for good cause, have the incidental consequence that access to some information from some sources may not be granted unless its subsequent public dissemination is regulated.

Section 905.27, by contrast, is a direct, express punishment and restraint on speech based upon its content. The State has it backwards: the direct purpose and effect of the statute is to restrict and punish speech; the putative incidental effect is that this suppression of truth will assist the operation of the Florida grand jury system. In reality, the statute serves only the impermissible purpose of punishing and "chilling" meaningful reporting and public discussion about Florida grand juries.

CONCLUSION

For the foregoing reasons, the unanimous decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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